Ketua Pengarah Hasil Dalam Negeri v Tenaga Nasional Bhd

FEDERAL COURT (PUTRAJAYA) — APPEAL NO 01(f)-27–09 OF 2024(W)
ABANG ISKANDAR PCA, NALLINI PATHMANATHAN, ZABARIAH YUSOF, RHODZARIAH BUJANG AND ABU BAKAR JAIS FCJJ
2 JULY 2025

Revenue Law — Income tax — Reinvestment allowance — Director General of Inland Revenue ('DGIR') rejected claim by Tenaga Nasional Bhd ('TNB') for Reinvestment Allowance ('RA') under Schedule 7A of Income Tax Act 1967 and imposed additional tax — DGIR stated that applicable legal provision was Schedule 7B as TNB's principal activity was generating electricity — TNB filed judicial review application — High Court allowed judicial review application — Court of Appeal affirmed High Court's decision — Real intention of Parliament in enacting Schedules 7A and 7B of Income Tax Act 1967 — Whether TNB was in the business of manufacturing when it generated, transmitted and distributed electricity for sale to its customers — Whether Schedule 7A or 7B of Income Tax Act 1967 applied — Income Tax Act 1967 Schedules 7A & 7B

The Director General of Inland Revenue ('the appellant') had rejected the claim by Tenaga Nasional Bhd ('the respondent') for Reinvestment Allowance ('RA') under Schedule 7A of the Income Tax Act 1967 ('Act 53') and subsequently imposed an additional tax amounting to RM1,812,506,384.64 against the respondent. This rejection was made after the appellant discovered via an internal audit that the respondent had claimed for the RA from Year of Assessment ('YA') 2003 until YA 2017 for PMU switchgear, transmission lines, transformer, capacitor, switchgear, underground cables, distribution lines and substation ('the said items'). The reason for such rejection was that the applicable legal provision under Act 53 was not Schedule 7A for RA but Schedule 7B for investment allowance, given that the respondent's principal activity was generating electricity which considered as service sector under Schedule 7B and not a manufacturing activity within the context of Schedule 7A. Aggrieved, the respondent filed a judicial review application against the appellant's decision. The learned High Court judge allowed the judicial review application and such decision was affirmed by the Court of Appeal, hence, the present appeal. The question of law for the court's determination was whether the Court of Appeal was correct in its determination of the respondent's activities was that of manufacturing under Schedule 7A of Act 53 based on the cases of *Majlis Perbandaran Seberang Perai v Tenaga Nasional Bhd* [2005] 1 MLJ 1 ('*MPSP*'s case') and *Ketua Pengarah Hasil Dalam Negeri v Success Electronics & Transformer Manufacturer Sdn Bhd* (2012) MSTC 30–039 ('*Success Electronics*'s case') without regard to the real

A intention of the Parliament in enacting Schedule 7B of Act 53 which applied to the utility sector ('the question of law'). In essence, the court had to decide the following issues: (a) whether the respondent was in the business of manufacturing when it generated, transmitted and distributed electricity for sale to its customers; and (b) whether Schedule 7A or 7B applied.

B

Held, allowing the appeal with no order as to costs:

(1) In *MPSP*'s case, the Federal Court mentioned that the appellant's power station, 'for all intent and purpose is a factory for the production of an article, that is electricity, just like any other manufacturing plants or factories that manufacture goods or articles'. Nonetheless, the Federal Court made the said quoted statement specifically for the purpose of considering whether electricity was an article within the definition of 'annual value' in proviso (b) of Schedule 2 of the Local Government Act 1976 since 'article' was not defined in the said s 2. Thus, that statement must be looked at within the confines of the relevant statutory provisions in the said case for in the court's view that was not meant to be a general and all-encompassing statement regardless of the applicable law at hand (see para 18).

(2) Similarly, for *Success Electronics*'s case because reliance on the dictionary meaning of factory was warranted since the claim for RA by Success Electronics was for expenses incurred in respect of its research and development room and the appellant's internal ruling restricted a taxpayer's entitlement to RA to production area only. This, therefore necessitated a determination whether the other paraphernalia and building space in the respondent's premises was a factory and 'factory' was only defined in Schedule 3 of Act 53, not Schedule 7A. However, in the present case, 'manufacturing' was specifically defined in para 9 of Schedule 7A and likewise 'approved service project' which encompassed that of 'utilities' in para 9 of Schedule 7B (see para 18).

(3) The Parliament's intention in enacting Schedule 7A and Schedule 7B should be the court's paramount consideration to decide the applicability of which of the two Schedules. It was obvious from the explanatory statements of the Bills to introduce the said two Schedules that the intention of the Parliament to enact: (a) Schedule 7A was to incentivise manufacturing companies to reinvest in their existing businesses in our country; and (b) Schedule 7B was to provide investment allowance incentives specifically for companies involved in the service sector. In this regard, there was no ambiguity because it was patently obvious that the said two Schedules were meant for and to cater for two different scenarios, ie, 'manufacturing' and 'utilities' (see paras 18–21).

(4) More pertinently, para 1 of Schedule 7A must be read with para 2 in that the RA claim must be on capital expenditure on a factory, plant or

machinery used in Malaysia for the purpose of a qualifying project referred to under sub-para 8(a) and 'qualifying project' specifically was defined in para 8. There was no justification by the respondent that the said items as listed earlier which fell under the said definition was one of 'expanding, modernising or automating its existing business'. Given that the respondent had already been granted capital allowance in respect of the said items, the court agreed with the learned counsel for the appellant that allowing its claim for RA for the same items would amount to double dipping, ie, obtaining the same relief twice which was prohibited in tax law (see para 21).

(5) On the applicability of which of the said Schedules, even if the court agreed that the respondent was manufacturing electricity, nevertheless, electricity was indisputably a form of utility and the court referred to the decision of the Court of Appeal in *Tenaga Nasional Bhd v Syarikat Bekalan Air Selangor Sdn Bhd & Anor* [2018] 1 MLJ 810 where David Wong Dak Wah JCA (as His Lordship then was) unequivocally stated that both the parties therein were public utility vehicles. That was obviously a correct description of the parties which was a persuasive factor in the court's determination of the issue in the present case and therefore it must come within the confines of Schedule 7B, unlike other taxpayers who were manufacturing a non-utility product. In this regard, the court was in complete agreement with the learned counsel for the appellant that the legal maxim of *lex posterior derogate (legi) priori* applied (see para 22).

(6) Although the court could not blame the respondent for filing its claim for RA under Schedule 7A based on its stand that it qualified for it because it manufactured electricity, however, making that choice did not mean that the appellant had no option but to accede to it. That was the same for any other applicants of a statutory claim for it was the approving authority which must decide whether an approval be granted for such a claim and of course, if not, the aggrieved party had the legal right in an appropriate factual and legal circumstance to question that decision in court. Accordingly, and in conclusion, the court answered the question of law in the negative (see paras 22–23).

[Bahasa Malaysia summary

Ketua Pengarah Hasil Dalam Negeri ('perayu') telah menolak tuntutan oleh Tenaga Nasional Bhd ('responden') untuk Elaun Pelaburan Semula ('EPS') di bawah Jadual 7A Akta Cukai Pendapatan 1967 ('Akta 53') dan seterusnya mengenakan cukai tambahan berjumlah RM1,812,506,384.64 terhadap responden. Penolakan ini dibuat selepas perayu mendapati melalui audit dalaman bahawa responden telah menuntut untuk EPS dari Tahun Taksiran ('TT') 2003 hingga TT 2017 bagi peralatan alat suis PMU, talian penghantaran, pengubah, kapasitor, peralatan suis, kabel bawah tanah, talian

agihan dan pencawang ('item-item tersebut'). Sebab yang diberikan bagi penolakan tersebut ialah peruntukan undang-undang yang terpakai di bawah Akta 53 bukanlah Jadual 7A untuk EPS tetapi Jadual 7B untuk elaun pelaburan, mengambil kira bahawa aktiviti utama responden adalah penjanaan elektrik yang dianggap sebagai sektor perkhidmatan di bawah Jadual 7B dan bukan aktiviti pengilangan dalam konteks Jadual 7A. Terkilan, responden memfailkan permohonan semakan kehakiman terhadap keputusan perayu. Hakim Mahkamah Tinggi yang bijaksana membenarkan permohonan semakan kehakiman tersebut dan keputusan tersebut telah disahkan oleh Mahkamah Rayuan, justeru, rayuan semasa. Persoalan undang-undang untuk penentuan mahkamah adalah sama ada Mahkamah Rayuan adalah betul dalam menentukan bahawa aktiviti responden ialah pengilangan di bawah Jadual 7A Akta 53 berdasarkan kes *Majlis Perbandaran Seberang Perai v Tenaga Nasional Bhd* [2005] 1 MLJ 1 ('kes *MPSP*') dan *Ketua Pengarah Hasil Dalam Negeri v Success Electronics & Transformer Manufacturer Sdn Bhd* (2012) MSTC 30–039 ('kes *Success Electronics*') tanpa mengambil kira hasrat sebenar Parlimen dalam menggubal Jadual 7B Akta 53 yang terpakai kepada sektor utiliti ('persoalan undang-undang tersebut'). Pada dasarnya, mahkamah perlu memutuskan isu-isu berikut: (a) sama ada responden berada dalam perniagaan pengilangan apabila ia menjana, menghantar dan mengagihkan elektrik untuk dijual kepada pelanggannya; dan (b) sama ada Jadual 7A atau 7B terpakai.

Diputuskan, membenarkan rayuan tanpa perintah berkaitan kos:

(1) Dalam kes *MPSP*, Mahkamah Persekutuan menyebut bahawa stesen janakuasa perayu, 'for all intent and purpose is a factory for the production of an article, that is electricity, just like any other manufacturing plants or factories that manufacture goods or articles'. Walau bagaimanapun, Mahkamah Persekutuan membuat pernyataan yang dipetik tersebut secara khusus bagi tujuan menimbangkan sama ada elektrik adalah artikel dalam takrifan 'annual value' dalam proviso (b) Jadual 2 Akta Kerajaan Tempatan 1976 memandangkan 'artikel' tidak ditakrifkan dalam seksyen 2 tersebut. Oleh itu, pernyataan tersebut mesti dilihat dalam lingkungan kes mahkamah yang berkenaan kerana pada pandangan mahkamah pernyataan tersebut tidak dimaksudkan untuk dijadikan sebagai suatu pernyataan yang umum dan menyeluruh tanpa mengira undang-undang yang terpakai (lihat perenggan 18).

(2) Begitu juga bagi kes *Success Electronics* kerana pergantungan pada makna kamus bagi perkataan kilang adalah wajar memandangkan tuntutan EPS oleh Success Electronics adalah untuk perbelanjaan yang ditanggung berkenaan dengan bilik penyelidikan dan pembangunannya dan ketetapan dalaman perayu mengehadkan kelayakan pembayar cukai kepada EPS kepada kawasan pengeluaran sahaja. Oleh itu, ini memerlukan penentuan sama ada peralatan dan ruang bangunan lain di dalam premis responden adalah kilang dan 'kilang' hanya ditakrifkan

dalam Jadual 3 Akta 53, bukan Jadual 7A. Walau bagaimanapun, dalam kes semasa, 'pengilangan' ditakrifkan secara khusus dalam perenggan 9 Jadual 7A dan begitu juga 'projek perkhidmatan yang diluluskan' yang merangkumi 'utiliti' dalam perenggan 9 Jadual 7B (lihat perenggan 18).

(3) Hasrat Parlimen dalam menggubal Jadual 7A dan Jadual 7B harus menjadi pertimbangan utama mahkamah untuk memutuskan keterpakaian antara kedua-dua Jadual tersebut. Jelaslah daripada penyata penjelasan Rang Undang-undang untuk memperkenalkan dua Jadual tersebut bahawa hasrat Parlimen untuk menggubal: (a) Jadual 7A adalah untuk memberi insentif kepada syarikat perkilangan untuk melabur semula dalam perniagaan sedia ada mereka di negara kita; dan (b) Jadual 7B adalah untuk menyediakan insentif elaun pelaburan khusus untuk syarikat yang terlibat dalam sektor perkhidmatan. Dalam hal ini, tidak ada kekaburan kerana adalah sangat jelas bahawa kedua-dua Jadual tersebut dimaksudkan bagi dan untuk memenuhi dua senario berbeza, iaitu, 'pengilangan' dan 'utiliti' (lihat perenggan 18–21).

(4) Lebih penting lagi, perenggan 1 Jadual 7A harus dibaca bersama perenggan 2 kerana tuntutan EPS haruslah atas perbelanjaan modal ke atas kilang, loji atau jentera yang digunakan di Malaysia untuk tujuan 'qualifying project' yang dirujuk di bawah sub-para 8(a) dan 'qualifying project' secara khusus telah ditakrifkan dalam perenggan 8. Tidak ada justifikasi oleh responden bahawa item-item tersebut yang dinyatakan sebelum ini yang termasuk di bawah takrifan tersebut berjumlah kepada 'expanding, modernising or automating its existing business'. Memandangkan responden telah pun diberikan elaun modal berhubung item-item tersebut, mahkamah bersetuju dengan peguam terpelajar bagi perayu bahawa membenarkan tuntutannya untuk EPS bagi item-item yang sama akan berjumlah kepada 'double dipping', iaitu, mendapatkan relif yang sama dua kali yang dilarang dalam undang-undang cukai (lihat perenggan 21).

(5) Mengenai persoalan tentang Jadual mana yang terpakai, walaupun mahkamah bersetuju bahawa responden adalah pengeluar elektrik, namun, tidak dapat dinafikan bahawa elektrik adalah satu bentuk utiliti dan mahkamah merujuk kepada keputusan Mahkamah Rayuan dalam kes *Tenaga Nasional Bhd v Syarikat Bekalan Air Selangor Sdn Bhd & Anor* [2018] 1 MLJ 810 di mana David Wong Dak Wah, HMR (pada ketika itu) menyatakan dengan jelas bahawa kedua-dua pihak dalam kes tersebut adalah 'public utilities vehicles'. Jelas sekali itu adalah huraian yang betul tentang pihak-pihak tersebut yang merupakan faktor persuasif dalam penentuan mahkamah ke atas isu dalam kes semasa dan oleh itu ia harus berada dalam lingkungan Jadual 7B, tidak seperti pembayar-pembayar cukai lain yang mengilangkan produk bukan utiliti. Dalam hal ini, mahkamah bersetuju sepenuhnya dengan peguam

terpelajar bagi perayu bahawa maksim undang-undang *lex posterior derogate (legi) priori* adalah terpakai (lihat perenggan 22).

(6) Walaupun mahkamah tidak boleh menyalahkan responden kerana memfailkan tuntutannya untuk EPS di bawah Jadual 7A berdasarkan pendiriannya bahawa ia layak untuk itu kerana ia mengeluarkan elektrik, namun, membuat pilihan tersebut tidak bermakna perayu tidak mempunyai pilihan selain bersetuju dengannya. Perkara tersebut adalah sama bagi mana-mana pemohon tuntutan berkanun yang lain kerana pihak berkuasa yang meluluskan yang harus memutuskan sama ada kelulusan diberikan untuk tuntutan sedemikian dan sudah tentu, jika tidak, pihak yang terkilan mempunyai hak undang-undang dalam keadaan fakta dan undang-undang yang sesuai untuk mempersoalkan keputusan tersebut di mahkamah. Sehubungan itu, dan sebagai kesimpulan, mahkamah menjawab persoalan undang-undang tersebut secara negatif (lihat perenggan 22–23).]

Cases referred to

AGL Victoria Pty Ltd v Lockwood (2003) VSC 453, SC (refd)

Board of Counsellors, Bhatpara Municipality v CESC Limited & Ors [2007] CAL 186 (refd)

Canadian Wirevision Limited v The Queen [1979] 2 FC 164, FC (refd)

Canada (Deputy Minister of National Revenue, Custom & Excise – MNR) v Quebec (Hydro-Electric Commission [1970] SCR 30, SC (not folld)

CIT v Mahendra Mills [2002] 243 ITR 56, SC (refd)

Commissioner of Customs v M/S Dillip Kumar & Co AIR 2018 SC 3606, SC (refd)

Commissioner of Income Tax v Mohan Meakin Breweries Ltd [1980] 122 ITR 203, HC (refd)

Commissioner of Income Tax v Standard Motor Products of India Ltd [1983] 142 ITR 877, HC (refd)

Director General of Inland Revenue v C Company of Malaysia Berhad [1980] 10 MTJ 64 (refd)

Director-General of Inland Revenue v Kulim Rubber Plantations Ltd [1981] 1 MLJ 214, FC (refd)

Great Lakes Power Ltd v Ontario (Regional Assessment Commissioner, Region No 31) [1997] OJ No 1051, CA (refd)

Kerajaan Malaysia v Jasanusa Sdn Bhd [1995] 2 MLJ 105; [1995] 2 CLJ 701, SC (refd)

Ketua Pengarah Hasil Dalam Negeri v Success Electronics & Transformer Manufacturer Sdn Bhd (2012) MSTC 30–039 (refd)

Ketua Pengarah Hasil Dalam Negeri v Tropiland Sdn Bhd [2013] MSTC 30-054 (refd)

Kidurong Power Generation Sdn Bhd v Menteri Kewangan Malaysia [2022] MLJU 3010; [2022] 1 LNS 2778, HC (refd)

Littman v Barron (Inspector of Taxes) [1951] 2 All ER 393, CA (refd)
Luttman v Imperial Chemical Industries Ltd [1955] 1 WLR 980 (refd)
MS Tata Iron and Steel Company Ltd v State of Jharkhand AIR 2005 SC 2871, SC (refd)
Majlis Perbandaran Seberang Perai v Tenaga Nasional Bhd [2005] 1 MLJ 1, FC (refd)
Maritime Electric Company, Limited v Ministry of National Revenue 65 DTC 282 (not folld)
Odisha Power Generation Corporation Ltd v State of Odisha & Another AIR 2015 Orissa 128, HC (refd)
NTPC Limited, New Delhi v Assessee ITA (No 1438/Del/2009) (refd)
National Land Finance Co-operative Society Ltd v Director General of Inland Revenue [1994] 1 MLJ 99; [1993] 4 CLJ 339, SC (refd)
Nuclear Electric PLC v Bradley (HM Inspector of Taxes) [1996] 168 TC 670, HC (refd)
Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal [2005] 3 MLJ 97; [2004] 1 MLRA 137, FC (refd)
Royal Bank of Canada v Canada (Deputy Minister of National Revenue, Customs and Excise — MNR) [1981] SCJ No 72, SC (refd)
Saxone Lilley & Skinner (Holdings) Ltd v Commissioners of Inland Revenue [1967] 44 TC 122 (refd)
State of Gujarat v Essar Oil Ltd AIR 2012 SC 1146, SC (refd)
Tenaga Nasional Bhd v Syarikat Bekalan Air Selangor Sdn Bhd & Anor [2018] 1 MLJ 810, CA (refd)

Legislation referred to

Corporations Act [CN] s 419(1)
Electricity Supply (Amendment) Act 2001
Electricity Supply Act 1990
Excise Tax Act [CN] Schedule V, para (a)
Factories and Machinery Act 1967
Finance Act 2009 s 46(f)
Income Tax (Prescription of Activity Excluded from the Definition of Manufacturing) Rules 2012 r 2, Schedule, para 11
Income Tax Act [CN] s 125.1
Income Tax Act 1967 ss 3, 99, 133A, Schedules 3, 7A, paras 1, 1(b), 2, 2B, 7, 8, 8(a), 9, Schedule 7B
Income Tax Act RSC 1952 [UK] s 40A
Income and Corporation Taxes Act 1988 [UK] s 393(8)
Interpretation Acts 1948 and 1967 s 17A
Local Government Act 1967 s 2
Service Tax Act 2018

Appeal from: *Ketua Pengarah Hasil Dalam Negeri v Tenaga Nasional Bhd*

A [2024] MLJU 1039 (Court of Appeal, Putrajaya)

Cyrus V Das (with Zaleha bt Adam, Ashrina bt Ramzan Ali, Muhammad Farid bin Jaafar, Surani bt Che Ismail, Mohamad Asyraf bin Zakaria and Nik Amyrah Syarinie bt Mohd Dusuki) (Inland Revenue Board of Malaysia) for the
B *appellant.*
DP Naban (with S Saravana Kumar, Nur Amira Ahmad Azhar and Dharshini Sharma) (Rosli Dahlan Saravana Partnership) for the respondent.

Rhodzariah Bujang FCJ:

C

INTRODUCTION

[1] The respondent in this appeal is indisputably the sole provider of electricity for sale to its customers in Peninsular Malaysia and was aggrieved by
D the appellant's decision to impose upon it an additional tax in a huge sum of RM1,812,506,384.64, which decision was conveyed to the respondent vide a notice of additional assessment dated 13 July 2020 after the appellant rejected the respondent's claim for Reinvestment Allowance ('RA') under Schedule 7A of the Income Tax Act 1967 ('the Act') in its Tax Return Form for the Year of
E Assessment ('YA') 2018. This rejection was made after the respondent conducted an internal audit on the respondent and it was discovered that the respondent had claimed for the RA from YA 2003 until YA 2017 for PMU switchgear, transmission lines, transformer, capacitor, switchgear, underground cables, distribution lines and substation. The appellant's reason
F for the said rejection, inter alia, was because the applicable legal provision under the Act is not Schedule 7A for RA but Schedule 7B for investment allowance, (which two Schedules would subsequently be elaborated in greater detail in our judgment), given that the respondent's principal activity is generating electricity which is not a manufacturing activity within the context
G of Schedule 7A, so it should instead have claimed for investment allowance for the service sector under Schedule 7B as it is carrying out utility services. Barely two weeks after being notified of the said rejection, the respondent filed on 21 July 2020 a judicial review application in the High Court to, inter alia, quash the said decision of the appellant as well as an appeal under s 99 of the
H Act on 11 August 2020 to the Special Commissioners of Income Tax ('SCIT'). The learned High Court judge ('HCJ') allowed the judicial review application on the 8 February 2022, which decision was unanimously affirmed by the Court of Appeal ('COA') on the 16 May 2024. Aggrieved by the said decision, the appellant filed a motion in this court for leave to appeal against that
I decision and leave was granted on 10 September 2024 premised on this sole question of law which is reproduced below:

> Whether the Court of Appeal is correct in its determination of the respondent's activities is that of manufacturing under Schedule 7A of the ITA 1967 based on the cases of *Majlis Perbandaran Seberang Perai v Tenaga Nasional Bhd* [2005] 1 MLJ 1

and *Ketua Pengarah Hasil Dalam Negeri v Success Electronics & Transformer Manufacturer Sdn Bhd* (2012) MSTC 30–039 without regard to the real intention of the Parliament in enacting Schedule 7B of the ITA 1967 which applies to the utility sector?

[2] Obvious from the said question of law, the sole issue for our determination in this appeal is whether the respondent is in the business of manufacturing when it generates, transmits and distributes electricity for sale to its customers and accordingly, the applicability of which of the two Schedules mentioned above would be our primary consideration. Thus, it is now timely for us to look at the said Schedules and s 133A under which they are legislated but given the length of the said Schedules, in particular Schedule 7A, only the relevant paragraphs are reproduced below together with said s 133A:

Part IXA

SPECIAL INCENTIVE RELIEF

133A Special incentive relief

Notwithstanding any other provisions of this Act, special incentive relief shall be given in accordance with Schedule 7A and Schedule 7B.

SCHEDULE 7A

[Section 133A]

Reinvestment Allowance

1. Subject to this Schedule, where a company which is resident in Malaysia —

(a) Has been in operation for not less than thirty-six months; and

(b) Has incurred in the basis period for a year of assessment capital expenditure on a factory, plant or machinery used in Malaysia for the purposes of a qualifying project referred to under subparagraph 8(a);

there shall be given to the company for that year of assessment a reinvestment allowance of an amount equal to sixty per cent of the expenditure:

7. This Schedule shall not apply to a company —

(a) for the basis period during which the company —

(i) has been granted pioneer status under the Promotion of Investments Act 1986 in respect of a promoted activity or promoted product and which is applying or intends to apply for the grant of a pioneer certificate; or

(ii) has been granted pioneer certificate under the Promotion of Investments Act 1986 in respect of a promoted activity or promoted product and whose tax relief period had not ended or ceased;

(b) for the basis period for which the company has been granted approval for investment tax allowance under the Promotion of Investments Act 1986

in respect of a promoted activity or promoted product for the period prescribed under the relevant provisions of that Act;

(c) for the basis period for which the company has been granted approval under section 31C of the Promotion of Investments Act 1986 prior to the coming into operation of section 37 of the Promotion of Investments (Amendment) Act 2007 [Act A1318] in respect of a manufacturing activity or manufactured product for the period prescribed under paragraph 31E(2)(b) of that Act.

8. In this Schedule, 'qualifying project' means —

(a) a project undertaken by a company, in expanding, modernising or automating its existing business in respect of manufacturing of a product or any related product within the same industry or in diversifying its existing business into any related product within the same industry:

9. In this Schedule 'manufacturing means' —

(a) conversion by manual or mechanical means of organic or inorganic materials into a new product by changing the composition, nature or quality of such materials;

(b) assembly of parts into a piece of machinery or products; or

(c) mixing of materials by a chemical reaction process including biochemical process that changes the structure of a molecule by the breaking of the intra molecular bonds or by altering the spatial arrangement of atom in the molecule.

but does not include —

(aa) the installation of machinery or equipment for the purpose of construction;

(bb) a simple packaging operation such as bottling, placing in boxes, bags and cases;

(cc) a simple fixing:

(dd) a simple mixing of any products;

(ee) a simple assembly of parts:

(ff) any activity to ensure the preservation of products in good condition during transportation and storage;

(gg) any activity to facilitate shipment and transportation;

(hh) any activity of packaging or presenting goods for sale; or

(ii) any activity that may be prescribed by the Minister, notwithstanding the above interpretation:

'machinery' means a device or apparatus consisting of fixed and moving parts that work together to perform function in respect of a manufacturing activity, which is directly used in carrying out that activity in a factory;

...

'operation' means an activity which consists of the carrying on of a business referred to in paragraph 8;

'plant' means an apparatus used in respect of a manufacturing activity. which is directly used in carrying out that activity in a factory

...

SCHEDULE 7B

[Section 133A]

Investment Allowance for Service Sector

1. Where a company which is resident in Malaysia for the basis year for a year of assessment has incurred in the basis period for that year of assessment capital expenditure for the purpose of an approved service project, there shall be given to the company for that year of assessment an investment allowance of an amount approved by the Minister, such allowance being not less than sixty per cent of that expenditure.

...

9. For the purposes of this Schedule

'approved service project' means a project in the service sector in relation to transportation, communications, utilities or any other sub-sector as approved by the Minister.

[3] The appellant's unwavering stand at all court levels is that the respondent is not in the business of a manufacturing but rather is a service provider which is incentivised by Schedule 7B whereas that of the respondent, obviously is that in the opposite, so Schedule 7A applies.

THE UNANIMOUS DECISIONS OF THE HIGH COURT AND THE COURT OF APPEAL

[4] Both the lower courts here are of the view that the respondent's business of generating electricity, is that of manufacturing it and is not excluded by para 7 of Schedule 7A which lays out the specific circumstances in which a taxpayer's claim for RA may be rejected. The learned HCJ also in para 44 of Her Ladyship's grounds of judgment noted that the Minister of Finance in issuing the Income Tax (Prescription of Activity Excluded from the Definition of Manufacturing) Rules 2012 ('Rules 2012') listed 20 activities under Schedule(r 2) which are excluded as manufacturing but not that of generating electricity before stating in para 45 that the said Rules 2012 and para 7 of Schedule 7A likewise do not do so as well. A utility company, held the learned HCJ can also be a manufacturing company as decided by the courts in tax cases from the commonwealth countries which Her Ladyship considered in the

earlier paragraphs of her judgment, ie, *Nuclear Electric PLC v Bradley (HM Inspector of Taxes)* [1996] 168 TC 670, *Canada (Deputy Minister of National Revenue, Custom & Excise – MNR) v Quebec (Hydro-Electric Commission* [1970] SCR 30, *Maritime Electric Company, Limited v Ministry of National Revenue* 65 DTC 282, *Board of Counsellors, Bhatpara Municipality v CESC Limited & Ors* [2007] CAL 186, *NTPC Limited, New Delhi v Assessee ITA* (No 1438/Del/2009) which decisions are persuasive in nature as held by this court in *Director-General of Inland Revenue v Kulim Rubber Plantations Ltd* [1981] 1 MLJ 214. Her Ladyship relied heavily on this court's decision in the case cited in the question of law here, ie, *Majlis Perbandaran Seberang Perai* ('MPSP'), which, said Her Ladyship 'clearly established that the applicant is in the business of manufacturing electricity' and that is the same stand adopted by the Court of Appeal as stated by it in para 41 of its judgment. Her Ladyship opined that the items claimed by the respondent for the RA are related to manufacturing of electrical energy and that given the definition of 'qualifying project' (in para 8 of Schedule 7A) RA is claimable for a project which involves expansion of the same product, noting in para 58 of Her Ladyship's judgment that the respondent had stated in its application form for the RA, ie, exh AJMD1 to the appellant's affidavit in reply 3, that its 'transmission project consists of installation of new lines and reinforcement of existing lines to facilitate the increase in transmission of electricity to new development areas ...'. It is also clearly stated in the said form that 'The distribution project consists of installation of new lines and substations to increase the capacity for distribution of electricity to new areas'. The learned HCJ concluded her judgment by citing the Court of Appeal's decision in *Ketua Pengarah Hasil Dalam Negeri v Tropiland Sdn Bhd* [2013] MSTC 30–054, which held that 'court must take a holistic approach and look at the taxpayer's business in its entirety instead of taking particular facts in isolation' and that of the Supreme Court in *Kerajaan Malaysia v Jasanusa Sdn Bhd* [1995] 2 MLJ 105; [1995] 2 CLJ 701 which held that court should balance the government's need to realise the taxes and that of the taxpayer to be protected against arbitrary or incorrect assessments.

[5] The Court of Appeal in its judgment noted the fact that the respondent's RA claim was made in YA 2003 and that the definition of 'manufacturing' was inserted into para 9 in 2009 vide s 46(f) of the Finance Act 2009 but as provided in para 2B of Schedule 7A, the claim for RA has a lifespan of 15 years from the date it was first made. Therefore, held the Court of Appeal, that definition of 'manufacturing' does not apply to the respondent, and relying on the other cited case in the question of law framed, ie, *Success Electronics*' case the ordinary dictionary meaning of it be given based on the *Oxford Dictionary of English* (2nd Ed, Revised) and *Collins Online Dictionary*, ie, inter alia, 'make something on a large-scale using machinery' and 'the making or producing of anything: generation' respectively. The items claimed by the respondent, said the Court of Appeal relate to the manufacturing of electrical energy and the

words, 'factory, plant or machinery' in para 1(b) of Schedule 7A are to be read disjunctively. Citing s 17A of the Interpretation Acts 1948 and 1967 and this court's decision in *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal* [2005] 3 MLJ 97; [2004] 1 MLRA 137, the Court of Appeal applied the purposive approach and referred to the Parliamentary debate on the enactment of Schedule 7A to justify its view that 'manufacturing' should not be given a restrictive meaning but rather a purposive one. It then concluded, before ordering that the appeal be dismissed, that although the incentives provided under Schedules 7A or 7B are not an option but nonetheless, a taxpayer can apply for the special incentive's relief under either Schedules and if the taxpayer meets the conditions in Schedule 7A, as the respondent has done in this case, then he gets the RA which then ends the matter.

[6] As for the *MPSP*'s case both the High Court and Court of Appeal noted that the said case is not one under the Income Tax Act 1967 but is one under the Local Government Act 1967 ('the LGA') and the issue in the said case is, whether electricity is an article in order to determine whether it falls within the definition of the *annual value* of a power station, which underlined words is defined in s 2 of the LGA. However, both courts emphasised the fact that this court in *MPSP*'s case held the respondent in the cited case, is in the business of manufacturing electricity. Both courts noted in their respective judgment's that this court in *MPSP*'s case referred to two tax cases, ie, *Canadian Wirevision Limited v The Queen* [1979] 2 FC 164 and *AGL Victoria Pty Ltd v Lockwood* (2003) VSC 453 and held that 'electricity' is an 'an article in the context used in the LGA ...'. Therefore, the respondent was its manufacturer when this court held that power stations 'can be considered as a factory for the production of an article, that is, electricity just like any other manufacturing plant or factories that manufacture goods or articles'.

SUBMISSION OF PARTIES

[7] As we had mentioned earlier and which we now again reiterate, it is plainly obvious that the applicability of which of the two Schedules would determine the outcome of this appeal and that determination hinges on whether TNB is a manufacturer when it indisputably generates, transmits, distributes and sells electricity to its customers. Another indisputable fact is Schedule 7B was legislated after this court's decision in *MPSP*'s case. From a plain reading of the said two Schedules, it is also patently obvious that they are meant to cater for two totally different scenarios ie, for Schedule 7A it is incentivising a manufacturing company to reinvest in its existing business by allowing it to claim RA from the appellant in respect of 60% of its capital expenditure incurred, for its factory, plant or machinery whereas, for Schedule 7B it is to incentivise specifically those in the service sector of transportation, communication and utilities by allowing them to claim investment allowance

from the Minister of Finance for an amount which is not less than 60% of its capital expenditure on its project within five years from the date the project is approved. It is worth reiterating that what is approved project is defined in para 9 of Schedule 7B which we had adverted to and reproduced earlier in our judgment.

[8] Counsel of the appellant highlighted in his written submission that Schedule 7A was introduced in 1979 and amended via the Income Tax (Amendment) (No 2) Act 1979 (Act A451) on 11 April 1991 and Schedule 7B via Finance (No 2) Act 1996 (Act 544) on 1 February 1996 which restricts the applicability of Schedule 7A and that both Schedules must be read harmoniously and holistically. Contrary to the findings of the lower courts here, learned counsel submitted that Parliament never intended that a taxpayer be given a choice of making a claim under which Schedule and referred to a High Court decision in *Kidurong Power Generation Sdn Bhd v Menteri Kewangan Malaysia* [2022] MLJU 3010; [2022] 1 LNS 2778 where the applicant therein likewise was in the same business as that of the respondent here although for the town of Bintulu in Sarawak but it applied on 15 March 2017 for the tax incentives under Schedule 7B. However, at the outset, we must state, with respect to the appellant, the fact that *Kidurong Power* chose to file its claim under Schedule 7B does not, in itself, bar the respondent from filing its claim under Schedule 7A regardless of the fact that they are in the same line of business because obviously that fact alone does not in law give rise to an estoppel against the respondent herein. In other words, the claim of the respondent here must be decided on its own merits.

[9] Learned counsel for the appellant also, in a similar vein, is aggrieved by the respondent's inconsistent stand which is evidenced by the fact that it had in its company profiles, its listing on Bursa Malaysia and by the imposition of service tax, currently at 8% monthly on its consumers, acknowledged that it is providing utility services but yet filed its claim under Schedule 7A and not Schedule 7B. It could be, submitted learned counsel for the appellant, the intention of Parliament in enacting the two Schedules to give the taxpayer the right to choose which of the two Schedules to make its claim because obviously Schedule 7A is a general one whereas Schedule 7B is a specific one, so the maxim of *generalia specialibus non derogant* ought to apply. Learned counsel equally emphasised the fact that supply of electricity is a taxable service under the Service Tax Act 2018 and its subsidiary legislation and the respondent operates under the Electricity Supply Act 1990. Since Schedule 7B was enacted in 1996 whilst Schedule 7A in 1979, the maxim of *lex posterior derogate priori* applies, ie, the earlier law gives way to the latter law because Parliament never intended the two Schedules to cover the same subject matter. Learned counsel also drew out attention to the distinct fact that approval of incentive allowance in Schedule 7B lies in the hands of the Minister of Finance and not in the hands

of the appellant as in Schedule 7A. Therefore, learned counsel for the appellant concluded this point by submitting that the court should give due regard to public policy objective behind Schedule 7B and ensure that tax incentives for the three named sectors in it (utilities here in this case) are duly maintained within the preview of the Minister of Finance.

[10] As for the *MPSP*'s case, learned counsel submitted that the lower courts here erred in relying on *MPSP*'s case because the facts in that case do not apply to our case and the laws therein and here are not in pari materia because *MPSP*'s case is on s 2 of the LGA and not one under the like of Schedule 7A. Likewise, their reliance on the House of Lords' decision in *Nuclear Electric PLC*'s case because although Nuclear Electric PLC also produced and supplied electricity, the House of Lords never mentioned 'manufacture of electricity' when deciding whether investment income was a trading income under s 393(8) of their Income and Corporation Taxes Act 1988 which provision, it must be noted is not in pari materia with para 9 of Schedule 7A here. When we went through the judgment of Lord Jauncey in this case it is true that His Lordship never mentioned the said quoted words but what His Lordship said is that Nuclear Electricity is a producer and supplier of electricity generated by nuclear power and at p 717 of the judgment, His Lordship said 'However, having done so, NE during the year of assessment neither used the fund for the purpose nor employed it in any way, in the business of generating electricity' so the word 'manufacturing' was never used specifically by the House of Lords. Likewise, submitted learned counsel further, the decision of the Canadian Supreme Court in *Canada (Deputy Minister of National Revenue, Custom & Excise – MNR) v Quebec (Hydro-Electric Commission*'s case because the word 'manufacture and production' in the context of para (a) of Schedule V of the Canadian's Excise Tax Act is not in verbatim with paras 8 and 9 of Schedule 7A and the facts therein also bear no similarities with ours. As for the case of *Maritime Electric Co, Limited* relied on by the learned HCJ, learned counsel submitted that the said case is not on RA but under s 40A of the Income Tax Act RSC 1952 which was enacted to encourage increased production through an incentive to increase sales although the appellants in the said case were also generating, transforming, transmitting and distributing electrical energy in Charlottetown, Prince Edward Island. However, said learned counsel s 40A is not similar nor in verbatim with any of the provisions of Schedule 7A. Therefore, it is also distinguishable and furthermore not applicable, for as was held in *Kulim Rubber Plantation*'s case, as far as decisions of other courts in England and other countries are concerned they are only persuasive authority although never lightly treated or not followed by our courts unless they were distinguishable or were decided per incuriam.

[11] Premised on the fact that the respondent is a public utility company and national provider of electricity, as recognised in a plethora of cases listed in

A para 263 of his written submission, involving the respondent here although as the appellant in the said cases which we find unnecessary to reproduce given the undisputable fact that the respondent is one as stated earlier, learned counsel for the appellant ended his written submission by stating that the appellant in this case had made a correct decision in disallowing the RA under Schedule 7A
B as claimed by the respondent because Schedule 7B is the applicable one and alternatively, Schedule 7A does not apply, because, the respondent is not engaging in a 'qualifying project' involving capital expenditure.

C **[12]** As for the respondent, its concrete stand is that it is not in the service sector, citing, firstly a decision of the *Great Lakes Power Ltd v Ontario (Regional Assessment Commissioner, Region No 31)* [1997] OJ No 1051 which held that the business of creation, distribution and sale of hydroelectric power is not that of a service provider but of a manufacturing company which decision was
D affirmed by Ontario's Court of Appeal in *Great Lakes Power Ltd v Ontario (Regional Assessment Commissioner, Region No 31)* [1997] OJ No 1051 and, of course, he also cited the *MPSP*'s case. Learned counsel highlighted the fact that when the *MPSP*'s case was decided, 'manufacturing' was not defined in the LGA, and likewise, in the Act when the respondent first claimed for the RA in
E YA 2003, for that definition was only introduced in the Act in 2009 via s 46(f) of the Finance Act 2009 with effect from YA 2009.

[13] Learned counsel for the respondent further amplified his submission point by referring to, in the sequence as narrated in his written submission, the
F House of Lord's decision in *Nuclear Electric*'s case, *Maritime Electric Company*'s case, that of the Supreme Court of Canada in *Royal Bank of Canada v Canada (Deputy Minister of National Revenue — MNR)* [1981] SCJ No 72, the Indian High Court in *Odisha Power Generation Corporation Ltd v State of Odisha & Another* AIR 2015 Orissa 128 and that of *NTPC*'s case, some of which the
G learned HCJ had relied on as we had briefly indicated in our judgment, that the business of generating and distributing electricity is that of manufacturing. As did the learned HCJ, learned counsel for the respondent also relied on *Kulim Rubber Plantation*'s case to justify his reliance on the aforesaid commonwealth cases and therefore the correctness of the lower courts' finding here that the
H respondent is in the business of manufacturing.

[14] As for the applicability of Schedule 7B, learned counsel for the respondent submitted that it is irrelevant because the RA claimed by the respondent is confined to its manufacturing activities, which does not involve
I any approved service project and para 2 of Schedule 7B provides that a project is one if an application is submitted to the Minister, which is subject to such terms and conditions to be considered by the Minister. Furthermore, submitted learned counsel, r 2 of the 2012 Rules lists out the activities which the Minister seeks to exclude from the definition of 'manufacturing' which are

purely those in the service sectors and because there was no explicit exclusion of the respondent's business (unlike that of wastewater treatment in para 11 of the said Rules) the respondent is not excluded from claiming RA under Schedule 7A. The House of Lord's case of *Saxone Lilley & Skinner (Holdings) Ltd v Commissioners of Inland Revenue* [1967] 44 TC 122 was cited as authority for that proposition of his. Learned counsel for the respondent also stressed the fact that both the learned HCJ and the COA noted in their judgments, at para 61 and para 63, respectively, the definition of manufacturing in para 9 of Schedule 7A was only made in 2009 and since the RA here was claimed in YA 2003 the said definition does not apply to the respondent because as held by the Supreme Court in *National Land Finance Co-operative Society Ltd v Director General of Inland Revenue* [1994] 1 MLJ 99; [1993] 4 CLJ 339 when there is any ambiguity on whether the Legislature intended an impairment of a taxpayer's existing right and takes away a vested right, such ambiguity must be construed and resolved in the taxpayer's favour.

[15] Learned counsel for the respondent also submitted that the respondent has the liberty to choose which provision of the Act it wishes to claim its benefits from, which was what the Indian Supreme Court held in *CIT v Mahendra Mills* [2002] 243 ITR 56 and the appellant here therefore cannot dictate which choice the taxpayer must make. In his submission in reply, learned counsel for the respondent stressed the fact that the respondent's claim for RA is for the manufacturing activity it undertook and not on the infrastructure related to the supply of electricity to its customers. This, the learned HCJ had noted in para 54 of Her Ladyship's judgment, ie, the respondent's RA claim for YA 2018 was not on the infrastructure related to electricity supply but in respect of the capital expenditure which was for the expansion, modernisation and automation of its business of manufacturing electricity because the installation and reinforcement of its existing and new lines and substations were to increase the capacity of electricity distribution. Thus, said learned counsel for the respondent is 'manufacturing' electricity and since 'manufacturing' was not defined in the Act in 2003, the ratio in *MPSP*'s case applies. Reliance on *Kidurong*'s case submitted learned counsel is misconceived because the respondent is not privy to that decision and the respondent made its claim for RA in YA 2003 before *Kidurong*'s case made its claim on 15 March 2017.

[16] As for the maxim of *generalia specialibus non derogant*, learned counsel for the respondent submitted that it only applies if there is a conflict and inconsistency between the provisions in the statute and there is none between the two Schedules herein for they cater for different investment projects so there is no ambiguity, and even if there is, that ambiguity should be construed in favour of the respondent as held in *National Land Finance*'s case and not in favour of the appellant. Learned counsel for the respondent also reiterates in his

reply submission, that contrary to the appellant's contention, the commonwealth law cases cited by him in his main submission apply. He stressed further that there is no requirement in Schedule 7A that a manufacturing activity be conducted in a factory when the respondent made the RA claim in YA 2003 because 'manufacturing' was only defined in the in Act 2009 and 'factory' was only defined in Rules 2012. Nevertheless, submitted learned counsel, the respondent is actually manufacturing electricity in a factory because in the absence of its definition in Schedule 2, as held by the High Court in *Success Electronic*'s case (which decision was affirmed by the COA), a dictionary meaning of it be given the respondent's vested right as it stood in the YA 2003 should be preserved, said learned counsel because as held by the Supreme Court in *National Land Finance Co-operative Society Ltd*'s case, '... a retrospective operation should not be given to a statute to impair an existing right', which was the decision too in *Kidurong*'s case.

OUR DECISION

[17] Granted that the sole issue for our determination here, as stated earlier in our judgment is a fairly simple one, which is whether the respondent manufactures electricity in order to determine whether Schedule 7A or 7B applies, nonetheless, in order to arrive at a justiciable conclusion for the parties herein, that determinative process leading to the said conclusion has to be undertaken with an in-depth consideration of not just the legislative history governing the relevant law here but also the myriad of case authorities, local and foreign, which have been cited by both learned counsel herein. Since, the *MPSP*'s case and *Success Electronic*'s case are incorporated in the framed question of law, it is best that we consider both now:

(a) *MPSP*'s case obviously, as highlighted by learned counsel for the appellant before us, involves, inter alia, the issue of whether electricity is an article in order to determine if it comes within the definition of 'annual value' in s 2 of the LGA. This determination is essential in order to decide whether *MPSP*'s issuance of a new valuation list on a revaluation of the respondent's Stesen Jana Elektrik Seberang Perai for the period effective from 1 January 1996 based on, inter alia, the enhanced value of the machinery used in the generation of electricity, was correct since it was the respondent's contention that the said machinery falls within the exemption provision of s 2 of the LGA. In considering this issue, Haidar CJ (Malaya) referred to the definition of 'electricity' in the Electricity Supply Act 1990, as that of an article in the Factories and Machinery Act 1967 and held that the amendment to the definition of 'electricity' which removes 'electricity' as an article in the said Electricity Supply (Amendment) Act 2001 has no bearing on that definition under the Factories and Machinery Act 1967. His Lordship held in para 18 of the judgment that:

> [18] ... It is clear to us that the use of the machinery in the operation of the power station is subject to the regulatory powers of the Factories and Machinery Act 1967 and machinery installed in the power station is subject to licensing under it without which it would be unlawful to operate such machinery. In other words, the power station for all intent and purpose can be considered as a factory for the production of an article, that is, electricity just like any other manufacturing plant or factories that manufacture goods or articles. The article, that is, electricity is for sale to the consumers, large and small and therefore the respondent to that extent is involved in commercial/business activity peculiar in its own way.

As for the citation of the Canadian tax case of *Canadian Wirevision Limited*'s case and that of *AGL Victoria Pty Limited*'s case, both entails the respective court's determination in the said cases of whether electricity falls under the meaning of 'goods' in s 125.1 of the Income Tax Act (in *Canadian Wirevision Limited*'s case) and whether it is 'purchase' under s 419(1) of the Corporations Act (in *AGL Victoria Pty Limited*'s case). Haidar CJ (Malaya) in para 24 of the judgment noted the difference in the facts and legislations of the two cited cases but held that goods bear the same meaning as article and therefore supports the interpretation of electricity as an article in the context of LGA, ie, proviso (b) to the definition of 'annual value' in the LGA. Thus, His Lordship concluded that the answer to the question of law posed in the said case, of whether 'electricity' is an article for the purpose of determining the annual value of a power station in accordance with the definition of 'annual value' in s 2 of the LGA, is in the affirmative. It is pertinent to again reiterate that after this decision, the Electricity Supply (Amendment) Act 2001 redefined electricity by removing its classification as an 'article';

(b) *Success Electronic*'s case also involves the claim for RA by the respondent therein under Schedule 7A for the YA 2002 and YA 2003 where the same appellant as in this case before us decided that the respondent was only entitled to a reduced RA for the YA 2002 and not entitled to it for the YA 2003, which decision the SCIT, on appeal by the respondent therein reversed and the High Court affirmed. The appellant also lost its appeal in the COA. My learned brother Abang Iskandar bin Abang Hashim J, (as His Lordship then was) agreed with the SCIT that the word 'factory', though not defined in Schedule 7A however only in s 3 of the Act, includes its non-production area as well, ie, based on its dictionary meaning and giving it a more liberal interpretation following the case of *Director General of Inland Revenue v C Company of Malaysia Berhad* [1980] 10 MTJ 64, the English case of *Luttman v Imperial Chemical Industries Ltd* [1955] 1 WLR 980 and two Indian cases, ie, *Commissioner of Income Tax v Mohan Meakin Breweries Ltd* [1980] 122 ITR 203 and *Commissioner of Income Tax v Standard Motor Products of India Ltd* [1983] 142 ITR 877. Therefore, His Lordship affirmed the SCIT's decision that the respondent was entitled to claim RA in respect of

capital expenses spent on its meeting room, office spaces, toilets, staircases, void areas, lift lobby, surau and warehouse in Factory B and also the lighting adjustments, the installation of air conditioner, electrical fittings and partition walls in Factory C. As is trite, held His Lordship, any ambiguity in a provision that seeks to deprive a citizen of his property ought to be resolved in favour of the citizen, ie, the taxpayer in this case and concurred with the SCIT's decision to give a dictionary meaning to the word '*factory*' which is in line with the case stated before the SCIT, ie, *Commissioner of Income Tax v Standard Motor Products of India Ltd* [1983] 142 ITR 877 which held, inter alia, that fire service station, pump house, overhead tank and wells, overhead line and street lights are essential adjunct to the factory premises.

[18] Granted that this court in *MPSP*'s case specifically mentioned, as we had indicated above, that the appellants power station, 'for all intent and purpose is a factory for the production of an article, that is electricity, just like any other manufacturing plants or factories that manufacture goods or articles', ie, in essence the appellant is manufacturing electricity, nonetheless, this court made the said quoted statement specifically for the purpose of considering whether electricity is an article within the definition of 'annual value' in proviso (b) of Schedule 2 of the LGA since 'article' is not defined in the said s 2. Thus, that statement must be looked at within the confines of the relevant statutory provisions in the said case for in our view that is not meant to be a general and all-encompassing statement regardless of the applicable law at hand. Similarly, for *Success Electronic*'s case because reliance on the dictionary meaning of factory is warranted since the claim for RA by Success Electronics was for expenses incurred in respect of its research and development room and the appellant's internal ruling restricted a taxpayer's entitlement to RA to production area only. This, therefore necessitates a determination whether the other paraphernalia and building space in the respondent's premises is a factory and 'factory' is only defined in Schedule 3 of the Act, not Schedule 7A. However, in our case 'manufacturing' is specifically defined in para 9 of Schedule 7A and likewise 'approved service project' which encompasses that of 'utilities' in para 9 of Schedule 7B. We do appreciate the point raised by the learned counsel for the respondent in his written submission and which we had mentioned earlier in our judgment, the commonwealth law cases which have decided that those in the same business as the appellant herein are manufacturers. Though we have no reason to question the correctness of the said decisions for they were in respect of the statutory provisions applicable in the said countries, however, in order to justify the application of the ratio in the said cases, we have to really appreciate the fact that in this appeal, our primary consideration is which of the two Schedules apply and that none of the commonwealth cases referred to us have a corresponding statutory provision as these two Schedules. Therefore, in undertaking this task of ours, we are, firstly, in agreement with the learned counsel for the appellant that Parliament's

intention in enacting the said two Schedules is not only a relevant, but is an important factor to be considered by us. In other words, that should be our paramount consideration to decide the applicability of which of the two Schedules. In order to ascertain that intention, it is opportune for us now to reproduce the explanatory statement when the Bills to introduce the said two Schedules were tabled in Parliament, which is, the Income Tax (Amendment) (No 2) Bill 1978 for Schedule 7A and Finance (No 2) Bill 1995 for Schedule 7B. The amended Income Tax Act 1979 came into effect in March 1979 and that of the Finance Act in February 1996:

> Explanatory Statement
>
> The Income Tax (Amendment) (No. 2) Bill 1978
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> ...
>
> Clause 18 introduces a new Schedule 7A for the granting of reinvestment allowance. The reinvestment allowance is 25 per cent of the capital expenditure incurred oil a factory, plant or machinery used for an approved project. Such expenditure must be incurred within 3 years from 1st January 1979. Adjusted income equal to the amount of the reinvestment allowance is exempt from tax. Where there is a loss, the reinvestment allowance is carried forward. An exempt account must be kept of the exempt income and any dividends declared out of this account will also be exempt from tax. Where income ought not to have been exempted, additional assessments may be raised within12 years in order to counteract any benefit obtained from the exemption. A company whose tax relief period is still in force on or after 1st January 1979 will not qualify for reinvestment allowance. In the case of a company whose tax relief period ends on or before 31st December 1978 the capital expenditure must be incurred on a date which is more than 3 years after the date on which its tax relief period ends. An approved project is a project for manufacturing or processing undertaken by a company in expanding its existing business. Such a project must be approved under the Industrial Co-ordination Act 1975, where necessary.
>
> Explanatory Statement
>
> Amendments to the Income Tax Act 1967
>
> ...
>
> Clause 18 seeks to introduce a new Schedule 7B to provide investment allowance to an approved service project. An approved service project is defined as a project in the service sector in relation to transportation, communications, utilities or any other sub-sector as approved by the Minister. The investment allowance is provided in respect of capital expenditure incurred within five years from the date from which the approval is granted. Capital expenditure means capital expenditure incurred on plant, machinery, fixtures, premises, buildings, structures or works of a permanent nature. The rate of investment allowance in respect of an approved service project is 60 per cent of that expenditure (or any other rate as approved by the Minister) subject to 70 per cent of the statutory income of that business (of any other rate as approved by the Minister). This amendment is effective from the year of assessment 1996.

[19] Obvious from these explanatory statements that the intention of the Parliament to enact Schedule 7A was to incentivise manufacturing companies to reinvest in their existing businesses in our country. This was achieved by providing RA for capital expenditure incurred on plant, machinery, or factory used for a qualifying project which is defined in para 8 of Schedule 7A. The qualifying projects include expanding, modernising, automating, or diversifying the company's existing business in manufacturing or processing activities.

[20] As for Schedule 7B, it is to provide investment allowance incentives specifically for companies involved in the service sector, including transportation, communication, utilities, and other sub-sectors approved by the Minister of Finance. It was introduced to encourage investments in infrastructure and services that are essential for public welfare and economic development, which in our considered view, is helpful to promote the growth of the service sectors by allowing incentives to service sector companies for their capital expenditures in approved service projects. Equally relevant to note is the fact that after *MPSP*'s case, the Electricity Supply Act 1990 which governs the respondent was amended wherein electricity is no longer an article which was the finding of this court in *MPSP*'s case. Another relevant fact is that the respondent is one of the entities allowed to impose service charge under the Service Tax Act 2018. The significance of this is the unassailable inference that the respondent is in the service industry which is regularised by Schedule 7B. We do appreciate learned counsel for the respondent's contention that under the 2012 Rules, the Minister of Finance has been given the power to specify activities which would or would not fall under 'manufacturing' and the Minister did so by excluding waste water treatment, which is a utility service just like electricity from 'manufacturing' but did not do so for electricity. Likewise, the fact that what is 'factory' was only defined in the 2012 Rules and therefore, submitted learned counsel further, it does not apply to the respondent's claim for RA which was made in YA 2003 although as he had submitted earlier, based on *MPSP*'s case and *Maritime Electronic*'s case, the manufacturing of electricity takes place in a factory in three phases, ie, generation, transmission and distribution. Thus, he said the respondent has a vested right as it stood in the YA 2003 under Schedule 7B which is the like position taken by the learned HCJ in *Kidurong*'s case at para 28 of the judgment and the decision of the Supreme Court in *National Land Finance Co-operative Society Ltd v Director General of Inland Revenue* [1994] 1 MLJ 99; [1993] 4 CLJ 339, that such a right cannot be impaired by giving a retrospective effect to a statute and where there is ambiguity, that ambiguity must be construed in favour of the tax payer. However, it is raised by the learned appellant counsel before us when it comes to taxpayer's entitlement to tax benefit or tax exemption such ambiguity must be construed in favour of the Revenue as held in *Littman v Barron (Inspector of Taxes)* [1951] 2 All ER 393:

> The principle that in case of ambiguity a taxing statute should be construed in favour of the taxpayer does not apply to a provision giving a taxpayer relief in certain cases from a section clearly imposing liability.

This proposition of law was also applied by the Indian Supreme Court in *MS Tata Iron and Steel Company Ltd v State of Jharkhand* AIR 2005 SC 2871 and that of *State of Gujarat v Essar Oil Ltd* AIR 2012 SC 1146 and *Commissioner of Customs v M/S Dillip Kumar & Co* AIR 2018 SC 3606. The quotations from the above-mention cases really support the said proposition, contrary to that alleged by learned counsel for the respondent in his submission in reply. As for the learned counsel for the respondent's argument about the respondent's vested right as mentioned earlier, although the claim for the RA was for the YA 2003, that claim was submitted by the respondent for the YA 2018. Therefore, it must be considered in the light of the legal provision applicable then and not retrospectively.

[21] So, the question that instantly lodged in our mind now is whether there is such an ambiguity here. The answer to us is a 'no' because it is patently obvious that the said two Schedules are meant for and to cater for two different scenarios ie, 'manufacturing' and 'utilities'. More pertinently, para 1 of Schedule 7A must be read with para 2 in that the RA claim must be on capital expenditure on a factory, plant or machinery used in Malaysia for the purpose of a qualifying project referred to under sub-para 8(a) and 'qualifying project' specifically is defined in para 8, which we had reproduced earlier in our judgment. As rightly, submitted by learned counsel for the appellant, there was no justification by the respondent that these items as listed earlier which falls under the said definition is one of 'expanding, modernising or automating its existing business'. Given that the respondent had already been granted capital allowance in respect of the said items, we agree with learned counsel for the appellant that allowing its claim for RA for the same items would amount to double dipping, ie, obtaining the same relief twice which is prohibited in tax law.

[22] Now on the applicability of which of the said Schedules, even if we agree that the respondent, it is, to put it simply, manufacturing electricity, nevertheless, electricity is indisputably a form of utility and we would refer to the decision of the Court of Appeal in *Tenaga Nasional Bhd v Syarikat Bekalan Air Selangor Sdn Bhd & Anor* [2018] 1 MLJ 810 where David Wong Dak Wah JCA (as His Lordship then was) unequivocally stated that both the parties therein are public utility vehicles. That is obviously a correct description of the parties which is a persuasive factor in our determination of the issue here before us and therefore it must come within the confines of Schedule 7B, unlike other taxpayers who are manufacturing a non-utility product. In this regard, we are in complete agreement with learned counsel for the appellant that the legal

maxim of lex posterior derogat (legi) priori applies. Although we cannot blame the respondent for filing its claim for RA under Schedule 7A based on its stand that it qualifies for it because it manufactures electricity, however, making that choice does not mean that the appellant has no option but to accede to it. That is the same for any other applicants of a statutory claim for it is the approving authority which must decide whether an approval be granted for such a claim and of course, if not, the aggrieved party has the legal right in an appropriate factual and legal circumstance to question that decision in court.

[23] Accordingly, and in conclusion, we would answer the question of law posed to us in the negative. The appeal is therefore allowed but with no order as to costs, given this is a public interest case

Appeal allowed with no order as to costs.

Reported by Dzulqarnain Ab Fatar